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The Tulalip Tribes are the
 successors in interest to the
 Snohomish, Snoqualmie, and
 Skykomish tribes and other
 tribes and bands signatory to
 the Treaty of Point Elliott

November 14, 2006

Philip N. Hogen, Chairman
 National Indian Gaming Commission
 1411 L Street NW, Suite 9100
 Washington, DC 20005
 (202) 632-7066
 VIA FACSIMILE

Re: Proposed Class II Classification and Technical Standards

Atty Chairman Hogen,

On behalf of the Tulalip Tribes of Washington, I write to oppose the National Indian Gaming Commission's (NIGC) Proposed Rules regarding the "Definition for Electronic or Electromechanical Facsimile" and "Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids'" (Proposed Rule) as published in the Federal Register on May 25, 2006.

Tribal Leaders unanimously voiced their concerns at the NIGC's public hearing on September 19, 2006, stating that the proposed rules are unworkable, and should be withdrawn and revised through meaningful consultation with Tribal Governments. Similarly, industry experts echoed Tribal Leaders' concerns and discussed at length the fact that if finalized, the proposed rules would devastate the Class II gaming industry. Manufacturers also noted that no existing Class II games satisfy the requirements of the Proposed Rules and that significant time would be required for research and development of compliant machines.

Specific to Tulalip Tribes of Washington, we present the following comments regarding the Proposed Rules:

1. The proposed regulations disregard NIGC's duty to adequately consult with the Tribes.

The National Indian Gaming Commission ("Commission") has a duty to consult on a government-to-government basis with tribes prior to developing and publishing a rule which affects Indian Gaming nationwide. This duty was not met during the development of the proposed rule, "Classification Standards; Class II Gaming; Bingo, Lotto, et al; Proposed Rule" ("Rule").¹ As an agency of the United States, the Commission is charged with the fiduciary duty of a guardian to a ward.² Failure to provide adequate and meaningful government-to-government consultation with tribes is a breach of this duty.³

In the background statement of the proposed rule, the Commission listed six locations across the United States where the Commission would be appearing for government-to-government consultations with the tribes. There are over two hundred gaming tribes in the forty-eight states with Indian gaming and over five hundred tribes across the fifty states. In order to participate in these consultations, Tribes would have to journey to one of these six locations during the short one-month timeframe the Commission granted the consultations. It is extremely unlikely that a one-month window of time at six national locations is adequate to provide all tribes the ability to adequately consult with the Commission regarding the development of such far-reaching regulations.

¹ "Classification Standards; Class II Gaming; Bingo, Lotto, et al; Proposed Rule, 71 Fed. Reg. 30238 (May 25, 2006) (to be codified at 25 C.F.R. 502 and 546).

² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³ BLACK'S LAW DICTIONARY 640 (7th ed. 1999). ("Fiduciary relationship. A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship.")

It is true that during the development of the Rule, the Commission spent some time seeking input with tribes. However, after developing and preparing to publish the fifth draft of the Rule, which included input by the tribes and a tribal advisory committee, the Commission was contacted in April 2005 by the Department of Justice ("DOJ") with some concerns about the proposed rule.⁴ After five months of consultation with the DOJ and without input from tribes, the Commission acquiesced to concerns of the DOJ, changing the fifth draft of the Rule.⁵ The proposed Rule reflects these unilateral changes. Following these drastic changes to the April 2005 proposed Rule, the one-month time period for consultations was both inadequate and unrealistic.

2. The assessment commissioned by the NIGC to comply with the requirements of the "Unfunded Mandate Reform Act of 1995" concludes that the proposed rule changes would have a "significant negative impact" on Class II gaming and the tribes that operate Class II facilities.

Although both the preamble to the Rule issued on May 25, 2006 and the proposed changes to the Technical Standards released August 11, 2006 state that "the Commission has determined that this proposed rule does not impose an unfunded mandate on state, local or Tribal governments or on the private sector of more than \$100 million per year,"⁶ as of the public hearing held on September 19, 2006, The Tulalip Tribes' had not yet seen the assessment required by the "Unfunded Mandate Reform Act of 1995" ("UMRA").⁷ Upon hearing concerns from tribal leaders, including the Tulalip Tribes', at a public hearing held on September 19, 2006, regarding whether a study to assess the financial impact of the regulations had been completed, the NIGC commissioned a study to assess the financial impact of the proposed regulations as required by the UMRA.

A stated purpose of the UMRA is to "strengthen the partnership between the Federal government and State, local and tribal governments." Additionally, the purpose of the UMRA is to assist "Federal agencies in their consideration of proposed regulations affecting State, local, and tribal governments, by ... requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process." In furtherance of these goals, the UMRA requires a federal agency such as the Commission to "assess the effects of Federal regulatory actions on State, local and tribal governments."⁸ If it is determined that the actions is a "significant regulatory action" as defined by the UMRA,⁹ the agency is required to prepare a statement prior to the promulgation of any notice of proposed rulemaking, which is to be included in the general notice of proposed rulemaking and final rule.

The report commissioned by the NIGC clearly states that the "Class II machine revenue would decrease by \$142.7 million" dollars.¹⁰ Additionally, the assessment estimates the associated loss of non-gaming revenue to be \$9.6 million dollars.¹¹ Further, tribal government revenue is estimated to be reduced by \$17.4 million dollars.¹²

Importantly, the report also points out the detrimental impact the proposed regulations would have on the ability of tribes to negotiate a favorable gaming compact with the state in which they are located.¹³ Tribes would no longer have the ability to use

⁴ Classification Standards; Class II Gaming; Bingo, Lotto, et al; Proposed Rule, 71 Fed. Reg. 30240-30241.

⁵ *Id.* ("The proposed regulations differ from the fifth draft ... The changes to that draft are a result of the Commission addressing the concerns of DOJ that these regulations clearly distinguish between Class II and Class III games.")

⁶ Classification Standards; Class II Gaming; Bingo, Lotto, et al; Proposed Rule, 71 Fed. Reg. 30233.

⁷ Unfunded Mandate Reform Act of 1995, 2 U.S.C. § 1501 (1), (7) (2006).

⁸ Webster, Alan, "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," Analysis Group, Inc., (November 3, 2006).

⁹ 2 U.S.C. § 1501 (1), (7) (2006).

¹⁰ 2 U.S.C. § 1531.

¹¹ 2 U.S.C. § 1532 (a) (Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000.00 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement...).

¹² 2 U.S.C. § 1532 (a)-(b).

¹³ Webster, Alan, "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," Analysis Group, Inc., (November 3, 2006) p. iii.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* p. 16.

the Class II gaming as a fall back position, thus losing leverage in the negotiation process.¹⁷ In Washington, sixteen of the twenty-nine federally recognized tribes operate Class II machines in their facilities, including the Tulalip Tribe.¹⁸ The report attributes the growth of Class II machines to the limitations on Class III machines imposed upon the tribes the terms of the gaming compacts.¹⁹ The proposed regulations would leave gaming tribes in Washington without a "viable alternative" for growth without a new compact.²⁰

3. The "Consultation and Coordination with Indian Tribal Governments" Executive Order No. 13,175 requires deference to Indian tribes and consideration of alternatives which preserve the prerogatives and authority of Indian Tribes.

The Commission must comply with the "Consultation and Coordination with Indian Tribal Governments" Executive Order ("Order") when promulgating rules which have tribal implications.²¹ Regulations which have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes are subject to the requirements of the Order.²² In the promulgation of the Rule, the Commission has not adequately complied with the requirements of Executive Order No. 13,175.

Executive Order No. 13,175 requires agencies formulating and implementing policies that have tribal implications to (1) defer to Indian tribes to establish standards where possible; (2) to consult with tribal officials to determine whether Federal standards are necessary; and (3) to look for alternatives which would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.²³ The significant changes to the Rule made by the Commission and the DOJ without consultation with Indian tribes and without proposing alternatives to this drastic change in policy completely fail to meet the requirements of this Order.

The Order also requires the agency to provide meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.²⁴ As noted above, the one-month consultation process provided by the Commission after significantly altering the April 2005 proposed rule does not meet this Presidential mandate.

4. Executive Order No. 13,175 requires a tribal summary impact statement to be included in a separate portion of the preamble of the proposed rule.

Executive Order No. 13,175 requires that no regulation with tribal implications that imposes substantial direct costs on Indian tribal governments be promulgated without the provision of (1) federal funds to pay the direct costs incurred by the Indian tribal government or tribe in complying with the regulation; or (2) agency consultation with the tribe prior to formal promulgation of the regulation and a summary impact statement in the preamble of the regulation.²⁵ There is no such summary impact statement included in the preamble of the Rule as published on May 23, 2006, or in the proposed changes to the Technical Standards released August 11, 2006. Indeed, there is nothing included in the preamble of the Rule which indicates that the Commission considered the direct costs to the tribes to implement this rule, nor is there a summary of the nature of the tribes concerns and the extent to which the tribal officials concerns have been met.²⁶

Although an assessment was completed and a report released on November 6, 2006, the Commission still must provide such impact statement to the tribes and Office of Management and Budget. These comments are the first written comments the Commission will consider since the proposed changes were released. Therefore, the Commission could not have yet summarized the nature of the tribes concerns and the extent to which tribal officials concerns have been met.

¹⁷ p. 16-17.

¹⁸ p. 31.

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²¹ Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

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²³ 65 Fed. Reg. at 67250.

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5. The proposed Rule does not provide adequate due process for the proposed machine certification process.

The proposed Rule requires submission of a game or electronic computer or other technologic aid to a testing laboratory.²⁷ The testing laboratory will evaluate and test the submission and provide a formal written report setting forth its findings and conclusions.²⁸ The laboratory is certified by the Commission. However, under the proposed Rule, any objection to the testing laboratory's certification is reviewed by the Commission Chairman who decides the issue and informs the laboratory and tribe of his decision.²⁹ The only appeal granted to the laboratory is to the Commission.³⁰ No independent outside agency or court is included in the decision until final decision for the purposes of the Administrative Procedure Act is rendered by the Commission. Only then may the laboratory or tribe seek an opinion from an independent disinterested party.³¹ This is not due process sufficient to protect the rights and interests of the laboratory, manufacturer and tribes.

6. "The Indian Gaming Regulatory Act" ("IGRA") clearly and adequately defines "bingo." The proposed regulations are legislation through administrative rulemaking and a violation of the fundamental principles of separation of powers.

IGRA gives a clear definition of Class II gaming and bingo.³² Indeed, this definition has been consistently upheld by court cases brought by the Department of Justice.³³ These cases make clear that tribes are not limited to "traditional" paper bingo games and confirmed that Class II games can be both fast and profitable. The proposed Rule restricts this definition of Class II gaming and under the Rule not even the games considered by the 10th Circuit in *MegaMania* would qualify as Class II games. Thus, the proposed Rule is an administrative reversal of judicial decisions.

This proposed Rule distorts the game of bingo as passed by the legislative branch of government and reaffirmed by the judicial branch. It is essentially an amendment to IGRA, a federal statute, through the administrative rule making process. The proposed Rule as promulgated by the Commission undermines the definition of Class II gaming as drafted by Congress, and usurps Congress' authority to legislate. The proposed rule so changes the game of Bingo as to unlawfully deprive the tribes the full benefit of the law.

7. The proposed Rule would have a detrimental effect on the Tulalip Tribes. It would eliminate the Tribes' only avenue of expansion and would require a drastic reduction in the current Class II gaming operation.

In Washington State, currently the only means for expansion of tribal gaming operations without a new compact is through the use of Class II games as currently defined by IGRA. Washington State utilizes a system whereby each tribe is allocated a certain number of "player terminals" or slot machines, which can then be used by the tribes in a gaming facility or can be leased from one tribe to another. At this time, there are no more player terminals available for use by a tribe.

Today at Tulalip Bingo, the Class II player terminals in operation bring in more revenue to the Tulalip Tribes than does the "paper" bingo games. At this time, none of the Class II games currently on the floor would qualify as Class II machines under the proposed Rule. If the proposed rule is promulgated as final, the Tulalip Tribes would have to remove the machines from the Class II facility which would require cutting the Bingo operation by at least half. The Tulalip Tribes and other Washington tribes are limited to two Class III gaming facilities per tribe; the Tulalip Tribes currently operate two Class III facilities and cannot expand further under the current gaming compact.

The survival of the Tulalip Bingo operation as it operates today depends on the combined revenue generated from both the Class II machines and Bingo. The loss of the Class II machines and resulting deterioration of the Bingo operation would have a significant detrimental cultural impact on the Tribes. In addition to the cultural impact, the decrease in operations at the Bingo facility would also create a loss of approximately 40 jobs, jobs held primarily by Tulalip tribal members. Due to the restrictions on Indian gaming facilities in Washington State, there is no option to replace the Class II machines in the Bingo facility.³⁴ The

²⁷ Classification Standards: Class II Gaming; Bingo, Lotto, et al; Proposed Rule, 71 Fed. Reg. 30259.

²⁸ *Id.*

²⁹ 71 Fed. Reg. 30259-60.

³⁰ *Id.*

³¹ 71 Fed. Reg. 30260.

³² 25 U.S.C. 2703 § (7).

³³ See *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000).

³⁴ *Supra* n. 20.

loss of these games would limit the Tulalip Tribes' ability to expand further and would, in fact, diminish the Tulalip Gaming Organization.

In conclusion, the proposed Rule will devastate tribal economies that depend largely on gaming revenues to fund tribal governmental programs, infrastructure, and other essential community needs. Therefore, our primary request is that the NIGC withdraw its proposed rules. Additionally, we request that no future revisions to these rules be promulgated without a meaningful and collaborative consultation with Indian Tribes. If the proposed regulations are finalized against our objections, the comment period should be extended before the regulation is finalized. Furthermore, we urge you to announce your intent to publish a revised draft before the end of the current comment period to ensure an adequate opportunity for Tribal comment and to fulfill the Commission's obligation to engage in meaningful government-to-government consultation with the tribes. Finally, we believe the NIGC should refrain from taking actions that will have such negative impacts nationwide, and instead seek to honor both the spirit and the language of IGRA, federal court rulings, and the NIGC's own regulatory framework and mandate.

Sincerely,

Mel Sheldon Jr.

Mel Sheldon, Jr.
Vice Chairman

CC: TTT BOD
Lael Echo-Hawk, Reservation Attorney's Office
Senator Patty Murray
Senator Maria Cantwell
Congressman Rick Larsen
Congressman Jay Inslee
Members of the Senate Committee on Indian Affairs
Members of the House Resources Committee
National Indian Gaming Association

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TO NIGC

Company NIGC

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FROM Tulalip Tribes

Company Tracie Stevens

Fax Number 360-651-4988

Phone Number 360-654-7623

MESSAGE

please find attach'd our formal
written comments on the proposed
classification + technical standards

Thank you -

Tracie Stevens

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